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5 IN THE UNITED STATES DISTRICT COURT  
6  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 KALLE KARL-HEINZ PIEPER and JOSE  
10 MONTOYA,

11 Plaintiffs,

12 v.

13 640 OCTAVIA LLC, ODLAW, INC.,  
14 EDWARD KOUNTZE, JEAN BOLDAN,  
NEIL MARTINSON, JUSTIN HUTTO, and  
DOES 1–20, inclusive,

15 Defendants.  
16 \_\_\_\_\_/

No. C 19-01038 WHA

*Related to*

No. C 18-01047 WHA

**ORDER GRANTING  
MOTION TO REMAND  
AND VACATING HEARING**

17 **INTRODUCTION**

18 In this landlord-tenant dispute, plaintiffs move to remand the case to state court after  
19 defendants removed it based on diversity jurisdiction. For the reasons stated below, the motion  
20 to remand is **GRANTED** and the May 2 hearing is **VACATED**.

21 **STATEMENT**

22 Plaintiffs Kalle Karl-Heinz Pieper and Jose Montoya lived in Apartment 3 of 640  
23 Octavia Street, a building owned by defendant 640 Octavia, LLC. In February 2018, 640  
24 Octavia LLC initiated Lawsuit Number One against Pieper in this district, asserting claims for  
25 unlawful detainer, breach of contract, and private nuisance. A scheduling order in that action  
26 set a July 2018 deadline for the parties to seek leave to amend their pleadings. Although  
27 Pieper’s answer raised 30 affirmative defenses — including retaliation, discrimination, and  
28 harassment — Pieper never sought leave to amend his pleading to name additional parties or to  
assert any counterclaims (Dkt. No. 1).

1 In December 2018, plaintiffs filed Lawsuit Number Two against defendants 640  
2 Octavia, LLC, Odlaw, Inc., Edward Kountze, Jean Bolden, Neil Martinson and Justin Hutto in  
3 San Francisco County Superior Court. The complaint alleged 25 claims arising out of  
4 plaintiffs' tenancy at 640 Octavia Street, including negligence, tenant harassment, retaliation,  
5 discrimination, unlawful collection of rent, and breach of the warranty of habitability.  
6 According to the complaint, defendants collectively engaged in a harassment campaign in an  
7 attempt to force plaintiffs to leave their coveted rent-controlled apartment in San Francisco's  
8 Hayes Valley neighborhood (*ibid.*).

9 On the eve of trial in Lawsuit Number One (the related unlawful detainer action), 640  
10 Octavia, LLC, Kountze and Bolden removed Lawsuit Number Two to this district court and  
11 moved to consolidate both. A jury has since returned a verdict in favor of Tenant Pieper in  
12 Lawsuit Number One and final judgment has been entered against 640 Octavia, LLC. In the  
13 midst of that trial, plaintiffs herein filed the instant motion to remand Lawsuit Number Two to  
14 state court (Dkt. No. 10). This order follows full briefing. Pursuant to Civil Local Rule 7-1(b),  
15 this order finds plaintiffs' motion suitable for submission without oral argument and hereby  
16 **VACATES** the hearing scheduled for May 2.

#### 17 ANALYSIS

18 Defendants may remove a civil action from state court to federal court pursuant to 28  
19 U.S.C. § 1441(a). The "strong presumption" against removal jurisdiction means that the  
20 defendant bears the burden of establishing proper removal. *Gaus v. Miles Inc.*, 980 F.2d 564,  
21 566 (9th Cir. 1992). Specifically, defendants have the burden of showing that the district court  
22 can exercise diversity jurisdiction under 28 U.S.C. § 1332, namely, that plaintiffs have different  
23 state citizenship than all properly named defendants. All agree that plaintiffs are citizens of  
24 California for purposes of diversity jurisdiction. This order concludes that remand is required  
25 because the landlord defendants have failed to meet their burden of establishing that Hutto, a  
26 properly named defendant, is *not* a citizen of California.

1           **1.       NO DIVERSITY OF CITIZENSHIP.**

2           In determining diversity jurisdiction, an individual's domicile is where he is both  
3 physically present and evinces an intention to remain indefinitely. *Lew v. Moss*, 797 F.2d 747,  
4 749–50 (9th Cir. 1986). The determination of an individual's domicile involves a number of  
5 factors, including current residence, voting registration and voting practices, location of  
6 personal and real property, location of brokerage and bank accounts, location of spouse and  
7 family, membership in unions and other organizations, place of employment or business,  
8 driver's license and automobile registration, and payment of taxes. Domicile is evaluated in  
9 terms of "objective facts," and "statements of intent are entitled to little weight when in conflict  
10 with facts." *Id.* at 750 (citation omitted).

11           The landlord defendants' removal papers only included Hutto's self-serving declaration  
12 in which he attested that his "state of domicile is Tennessee, in that [he] reside[s] there and/or  
13 ha[s] resided there and intend[s] to return there." According to Hutto's earlier deposition  
14 testimony, however, he has lived at 636 Octavia Street for the past five years while working as a  
15 delivery driver. Plaintiffs also submitted un rebutted evidence that Hutto drives a vehicle with  
16 California license plates and has done so since 2017 (Hutto Dep. 16:5–24; Pieper Decl. ¶¶ 4–5;  
17 Montoya Decl. ¶¶ 4–5; Hutto Decl. ¶ 1).

18           Defendants argue that Hutto's current residence in California is not controlling in light  
19 of his declaration. This order disagrees. To be sure, a defendant in the first instance need only  
20 allege facts adequate to support removal jurisdiction in his removal papers. *Gaus*, 980 F.2d at  
21 567. Where those facts are properly challenged, however, or where the court has independent  
22 cause to doubt their veracity, "the defendant bears the burden of actually proving the facts to  
23 support jurisdiction," *ibid.*, and must do so by a preponderance of the evidence, *McNutt v. Gen.*  
24 *Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936). Here, the landlord defendants  
25 have failed to prove by a preponderance of the evidence that Hutto is a citizen of Tennessee. In  
26 the face of plaintiffs' evidence suggesting that Hutto is domiciled in California, defendants put  
27 forth nothing to corroborate the conclusory legal opinion contained in Hutto's self-serving  
28 declaration. "Federal jurisdiction must be rejected if there is any doubt as to the right of

1 removal in the first instance” and courts must resolve all doubts as to removability in favor of  
2 remand. *Gaus*, 980 F.2d at 566. Such is the case here. This order need not determine whether  
3 additional non-diverse defendants have been named in this action.<sup>1</sup>

4 **2. NO FRAUDULENT JOINDER.**

5 If a defendant establishes fraudulent joinder, the citizenship of the fraudulently joined  
6 party will not defeat diversity. To prove fraudulent joinder, a defendant must show that “the  
7 plaintiff fail[ed] to state a cause of action against a resident defendant, and the failure is obvious  
8 according to settled rules of the state.” *McCabe v. Gen. Foods. Corp.*, 811 F.2d 1336, 1339 (9th  
9 Cir. 1987) (citation omitted). “[I]f there is any possibility that the state law might impose  
10 liability on a resident defendant under the circumstances alleged in the complaint, the federal  
11 court cannot find that joinder of the resident defendant was fraudulent, and remand is  
12 necessary.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009) (citation  
13 omitted).

14 This order disagrees with the landlord defendants that Hutto has been included as a  
15 “sham defendant” solely to defeat diversity jurisdiction. Plaintiffs allege that Kountze directed  
16 Hutto to surveil and harass them throughout 2017 and 2018. As part of this harassment, Hutto  
17 falsely claimed that Pieper maintained a “prostitution ring based out his apartment,” “harbor[ed]  
18 fugitives that have been deported from the country before for criminal charges,” was “very  
19 armed and dangerous” and had “threatened all of the neighbors and also threatened to burn  
20 down the apartment building if he is evicted.” In April 2018, moreover, Hutto sent Kountze and  
21 Boldan screenshots of Pieper’s “Amazon wish list” and advised Kountze to “check all of  
22 [Pieper’s] light bulbs” (Amd. Compl. ¶¶ 30, 63, 71, 74–76). As defendants admit, these  
23 allegations are sufficient to plead viable claims for libel and slander. Defendants have therefore  
24 failed to establish that there is no possibility that plaintiffs could state a claim against Hutto in  
25 California state court.

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27 <sup>1</sup> The Court is disappointed in Tenant Pieper’s argument that he did not “concede” diversity  
28 jurisdiction in Lawsuit Number One. To the contrary, Pieper explicitly “stipulate[d] to subject matter  
jurisdiction” and agreed not to “contest jurisdiction on appeal or later on” (Case No. 18-01047, 3/28/29 Hearing  
Transcript). In any event, here, unlike in Lawsuit Number One, Hutto is also named as a defendant.

1           **3. NO SEVERANCE.**

2           Although conceding that the amended complaint pleads a viable claim against Hutto,  
3 defendants next argue that these claims should be severed from the remainder of the action  
4 under the “fraudulent misjoinder doctrine,” a theory of procedural misjoinder under which  
5 plausible claims have been asserted against a party but joinder is nonetheless improper due to a  
6 lack of some real connection between the defendants. Our court of appeals has not adopted this  
7 idea, but has stated in an unpublished opinion that “[f]or purposes of discussion we will assume,  
8 without deciding, that this circuit would accept the doctrines of fraudulent and egregious  
9 joinder.” *California Dump Truck Owners Ass’n v. Cummins Engine Co., Inc.*, 24 Fed. Appx.  
10 727, 729 (9th Cir. 2001).

11           Assuming for purposes of this order that the fraudulent misjoinder theory is viable in  
12 this circuit, this order nevertheless concludes that it would be inapplicable here. All of  
13 plaintiffs’ claims involve the alleged harassment and mistreatment they experienced as tenants  
14 of 640 Octavia, LLC. This is a sufficient nexus between the claims against Hutto and the  
15 claims against any non-diverse defendants. It therefore cannot be said that there is no real  
16 connection between the claims asserted against defendants. For this same reason, this order  
17 declines to sever and remand claims against any non-diverse defendants under FRCP 21, which  
18 rule permits the severance of claims against multiple defendants “with respect to or arising out  
19 of the same transaction, occurrence, or series of transactions or occurrences.” Plaintiffs’ motion  
20 to remand the case to state court is accordingly **GRANTED**.

21           **4. NO ATTORNEY’S FEES.**

22           Plaintiffs request an award of costs and attorney’s fees pursuant to Section 1447(c) of  
23 Title 28 of the United States Code, which provides that an order of remand “may require  
24 payment to just costs and any actual expenses, including attorney fees, incurred as a result of  
25 removal.” A court has “wide discretion” in deciding whether to award attorney’s fees under  
26 this provision, *Moore v. Permanente Med. Group*, 981 F.2d 443, 447 (9th Cir. 1992), but  
27 “[a]ttorney’s fees should be awarded only where the removing party lacked an objectively  
28 reasonable basis for seeking removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141

1 (2005). Because this order cannot conclude that defendants lacked any objectively reasonable  
2 basis to remove this action, plaintiffs' request for attorney's fees is **DENIED**.

3 **CONCLUSION**

4 For the reasons set forth above, plaintiffs' motion for remand is **GRANTED**, the request  
5 for attorney's fees is **DENIED**, and the May 2 hearing is **VACATED**. The Clerk shall **REMAND**  
6 this action to the Superior Court of California, County of San Francisco and shall **CLOSE THE**  
7 **FILE**.

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9 **IT IS SO ORDERED.**

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11 Dated: April 30, 2019.

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14 WILLIAM ALSUP  
15 UNITED STATES DISTRICT JUDGE  
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